ing is clear but unable to be effectuated, its proper application being to the adoption of one of two possible meanings. It seems too clear for argument that the intention of the parties here was that there should be an absolute discharge from liability of the one joint tortfeasor, but that that absolute release was not to have the effect of releasing others. If there exists a condition void for repugnancy (and it seems there have been some) this seems to be in that class.

The fact that, under the old state of things, an evil was felt, can no longer be denied. There must be a change and what remedy is open if not the one suggested in the Dwy case? It is against logic to allow a reservation after an absolute release and it is against sense to say that a release is not intended in almost all cases. May a remedy be suggested humbly and with trepidation on the theory that a positive commanding paternalism is more tolerable than a cowardly misinterpreting paternalism? There seems to be somewhat of an analogy between a release and a penalty in this respect, that the one is a receipt of less than full compensation (shown by reservation clause), the other a promise to pay more than full compensation. The penalty, although intended, is held good only so far as it provides for substantial justice for the parties; hence recognizing the release as to the parties to it, but refusing to enforce it against others, not because it is none the less a release, but because it is better policy and prejudices none of the parties to it, to give it that effect. The net result is the same as in the Dwy case.

J. F. H.

LEGAL ETHICS—CHAMPERTY AND MAINTENANCE—ELEMENTS—Notwithstanding the promulgation of a Code of legal ethics by the American Bar Association, and its adoption by the bar associations of thirty States,[1] the courts have frequently indicated that their opinions will be guided by legal rather than ethical considerations, so that although a transaction may be legally unethical, it may, nevertheless, be not illegal. A recent decision [2] by the Supreme Court of Minnesota, one of the States which has adopted this Code, is an excellent illustration of the distinction. Attorneys solicited [3] the claim of one Johnson for personal injuries against a railroad company. The solicitation was successful and Johnson employed them under a contingent fee contract, by which they were to receive for their services one-third of any amount recovered by suit or settlement. The client was advised, however, not to settle, on the ground that heavy damages might be obtained by a jury trial. The attorneys

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[1] Amer. Bar Assoc. Rep. 560 (1914).

[2] Johnson v. Great Northern Ry. Co., 151 N. W. Rep. 125 (1915).

[3] In what manner the claim was solicited does not appear and apparently was considered of no importance by the court.

advanced money to their client with which to pay living expenses and hospital bills during the pendency of the case, while he was unable to earn anything. The contract further provided that the costs of litigation should be paid by the attorneys, and that they should be reimbursed therefor from the gross amount received from the proceeds of the action. The court held that the transaction did not constitute champerty or maintenance and that it was not against public policy. The court said: "We may have our individual opinions on these propositions as questions of good taste or legal ethics. But in the absence of some statute, we are unable to hold that it is illegal or against public policy for an attorney to solicit a case." It has been held, however, that to solicit causes of action tends to promote litigation and to degrade the profession and that not only was a contract made by an attorney with a client in consequence of solicitation invalid, but that also the attorney was not entitled to recover *quantum meruit* for the services rendered by him.[4] The latter view is strictly in accordance with the canons of ethics of the American Bar Association, in which it is provided,[5] *inter alia*, "It is disreputable . . . to breed litigation by seeking out those with claims for personal injuries or those having any other grounds of action in order to secure them as clients."

Authorities are greatly at variance as to what elements constitute champerty and maintenance. Blackstone defined the latter as "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it".[6] Champerty is a species of maintenance and includes the additional element of sharing in the possible proceeds of the litigation.[7] One of the commonest instances of such profit-sharing is exemplified in contracts by an attorney for a contingent fee, which, as a general rule, are not regarded champertous,[8] unless they are unreasonable or unconscionable, as where it is clear that advantage has been taken of the client's poverty.[9] Most mod-

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[4] Ingersoll v. Coal Creek Co., 117 Tenn. 263 (1906), in which case the attorney went to the scene of a disaster and solicited numerous injured persons to intrust him with the prosecution of their rights of action. It has been decided that a contract whereby an attorney agrees to pay for business brought to him is void. *In re* Clark, 184 N. Y. 222 (1906); *contra*, Vocke v. Peters, 58 Ill. App. 338 (1895).

[5] §28. Disbarment is therein advocated as a penalty for stirring up litigation.

[6] 4 Commentaries, 135.

[7] *Ibid.*

[8] "Wisely or unwisely, a point on which opinions may differ, the law has long been settled that such [*i. e.*, contingent] fees are lawful and enforceable by the courts, and something more than mere contingency of compensation is necessary to make them champertous." *Per* Mitchell, C. J., in Williams v. Phila., 208 Pa. 282 (1904).

[9] Moorehouse v. Brooklyn, 185 N. Y. 520 (1906). A contingent fee of

ern courts consider that a fair and honest contract for a contingent fee is as much for the benefit of the client as for the attorney, because if the former has a meritorious cause of action but no means with which to pay for legal services unless he can lawfully contract for a contingent fee to be paid out of the proceeds of the litigation, he will necessarily be deprived of his remedy, unless he confides his case to an attorney sufficiently unscrupulous to make a secret illegal agreement.[10] However, in view of the existence of legal aid societies in many communities, and also the possibility of a poor person suing *in forma pauperis*, and of the power of the courts to assign counsel to litigate the case of a poor client, it is believed that contingent fees might well be eliminated.[11] In a few States, a contract for an attorney's compensation will be deemed champertous where it provides that payment is not only to be contingent on success but also that such payment is to be made only from the amount recovered by him for the client.[12] But in the jurisdictions where this principle is followed, the rule is readily evaded by providing merely that a percentage of the amount recovered is to be paid after the successful termination of the suit, and by omitting a provision that the attorney is to have nothing if unsuccessful.[13] According to the weight of authority, a contract for a share of the proceeds of litigation is not champertous, unless the attorney carries on the proceedings at his own expense.[14] There are some States in which such a contract is not champertous, even though the costs of the suit are so paid.[15] However, in nearly all jurisdictions, where the suit is for divorce, a stipulation for the attorney's compensation providing that it is to be contingent upon the amount of alimony recovered, is illegal.[16]

As has just been stated, it is generally recognized that an agreement by an attorney to conduct litigation at his own expense, in consideration of all or a part of the recovery, is champertous and unen-

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fifty per cent. is not "unconscionable". *In re* Fitzsimmons, 174 N. Y. 15 (1903).

[10] Lipscomb v. Adams, 193 Mo. 530 (1906). See also Thornton on Attorneys at Law, Vol. 2, §421, where contingent fees are regarded favorably.

[11] This view is strongly advocated in Sharswood's "Legal Ethics" (4th ed.), p. 159 *et seq.* Committees of the Pennsylvania Bar Association (1908 and 1909) and a Committee of the New York Bar Association (1909) have reported against contingent fees. See, also, §13 of Amer. Bar. Assoc.'s Canons of Ethics.

[12] Ackert v. Barker, 131 Mass. 436 (1881); Butler v. Legro, 62 N. H. 350 (1883). The fact that in case of failure, the attorney is to receive a nominal recompense such as one dollar does not prevent the transaction from being champertous. Kelly v. Kelly, 86 Wis. 170 (1893).

[13] Hadlock v. Brooks, 178 Mass. 425 (1901). See also the interesting opinion in Phillips v. Louisville, *etc.*, Co., 153 Fed. Rep. 795 (1907).

[14] Jeffries v. Mutual Ins. Co., 110 U. S. 305 (1884); Geer v. Frank, 179 Ill. 570 (1899).

[15] Shelton v. Franklin, 224 Mo. 342 (1909).

[16] Neuman v. Freitas, 129 Cal. 283 (1900).

forceable. Obviously, an agreement by which the attorney indemnifies the client against costs is no less champertous.[17] But, it is not against public policy for an attorney to lend his client money with which to pay the costs of suit, when there is an undertaking for its repayment, regardless of the outcome.[18] *A fortiori*, where the client is a poor person, it is not improper to make such advances. The law of champerty and maintenance has never been carried so far as to render objectionable the rendition of legal services or the giving of assistance in aid of the litigation of indigent persons.[19] It has been said that "to investigate the claims or redress the wrongs of the indigent and the injured is no quixoticism, but a grave and highly honorable duty of the profession, the performance of which, if not voluntarily assumed, may be enforced by the court".[20] However, charitable motives are controlling as to whether or not such rendering of assistance constitutes champerty or maintenance.[21] There must be no speculative bargain to participate in the amount recovered.[22] In the principal case, the attorneys not only advanced the expenses of litigation, with an agreement of reimbursement therefor out of the proceeds, but they also lent the indigent client an amount sufficient to pay his living expenses and hospital bills. The court admitted that such a loan "may, in a sense, tend to foment litigation, by preventing a settlement from necessity; but we are aware of no authority holding that it is against public policy or of any sound reason why it should be so considered". It is submitted, however, that as the facts indicate that there was no purely charitable motive on the part of the attorneys, and that their interest was purely speculative, the contract should have been held to be champertous.

A. L. L.

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[17] Roller v. Murray, 107 Va. 527 (1907).

[18] Christie v. Sawyer, 44 N. H. 298 (1862).

[19] Wallace v. C. M. & St. P. Ry. Co., 112 Ia. 565 (1900); Jahn v. Champagne Lumber Co., 157 Fed. Rep. 407 (1908); Bristol v. Dann, 12 Wend. 142 (N. Y. 1834).

[20] Moore v. Campbell, 9 Yerg. 115 (Tenn. 1836).

[21] Harris v. Brisco, 17 Q. B. D. 504 (1886). *Cf.* Holden v. Thompson, [1907] 2 K. B. 489.

[22] Taylor v. Perkins, 157 S. W. Rep. 122 (Mo. 1913); *Re* Evans, 22 Utah, 366 (1900).